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No. 286.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

SOUTHEASTERN AVIATION, INC.,
d/b/a SOUTHEAST AIRLINES,
Appellant,

vs.

A. H. HURD, Individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, Deceased,
Appellee.

On Appeal from the Supreme Court of Tennessee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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APPEAL TAKEN IN CONFORMITY TO STATUTE.

In his Brief in Support of his Motion to Dismiss the Appeal, Appellee apparently concedes that the question of whether or not by the enactment of the Federal Aviation Act of 1958 the Congress so occupied the field of aviation as to preclude the state courts from jurisdiction in cases such as this is properly raised and before the Court on this Appeal (Motion to Dismiss Appeal with Brief in Support Thereof, p. 5).

As to the other questions presented by the Appeal, the Appellee contends that this appeal should be dismissed because it was not taken in conformity to statute and because, he insists, no substantial federal question is raised.

In support of his position that this Appeal is not taken in conformity to statute, the Appellee asserts that the question of federal constitutionality of a Tennessee statute was not "drawn in question" in the state court.

We respectfully disagree.

Throughout the state courts, by its pleadings (Record, Vol. I, pp. 29, 33-39), by objections to evidence (Record, Vol. III, pp. 416-420), by objections to the charge of the trial Court (Record, Vol. I, pp. 64-75), by assignments of error in the appellate courts (Record, Vol. VI, pp. 719-723, 725-731), this Appellant insisted that by the Federal Aviation Act of 1958 Congress had so pre-empted the field as to:

(1) Deprive the state courts of jurisdiction of the subject matter;

(2) Make **any law** of Tennessee applied to determine liability unconstitutional;

(3) Make unconstitutional the **application** of any law of Tennessee by the courts of Tennessee.

The Supreme Court of Tennessee passed on each of these questions. In its opinion[1] (Appendix to Jurisdic-

[1] In Appellee's Brief (p. 6) mention is made of the fact that at pages 10 and 11 of Appellant's Jurisdictional Statement there is a quotation of a portion of the Opinion of the Tennessee Supreme Court without any indication showing that the quotation was not complete and that there were certain omissions in the portion of the Opinion printed in the Jurisdictional Statement.

In the Jurisdictional Statement as prepared for the printer there was an indication that certain omissions had been made in the quotation, but through error such omissions were not indicated in the final printing. This error is sincerely regretted by counsel.

However, in the Appendix to the Appellant's Jurisdictional Statement the full Opinion of the Tennessee Supreme Court is set forth.

tional Statement, p. 4a), that Court stated the issue as follows:

> "**First.** Petitioner contends that by the Federal Aviation Act of 1958, 49 U. S. C. A., Sec. 1301 et seq., Congress took control of the air-space of the United States, set up a federal agency to license and regulate the operation of aircraft, and pre-empted the field so as to supplant **all state law** and state court jurisdiction therein; and that this action should be dismissed because the state court has no jurisdiction of it and **no state law may be applied to it**". (Emphasis ours).

The Supreme Court of Tennessee then proceeded to construe the provisions of the Federal Aviation Act of 1958, and concluded:

> "The Federal Aviation Act of 1958 appears to be merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety. It does not touch the traditional area of the law of torts or private right. . . ."
>
> (Appendix p. 7a.)
>
> ". . . it (this) is a suit in tort upon a right created by the law of the state . . ."
>
> (Appendix p. 7a.)
>
> ". . . the state courts has jurisdiction in this case . . ."
>
> (Appendix p. 7a.)
>
> ". . . this Act does not exclude state law not inconsistent with its purpose."
>
> (Appendix p. 5a.)

The Supreme Court of Tennessee then, to determine the question of negligence, applied the law of Tennessee, and based upon its finding that a jury question on violation

of the state law was presented, it disregarded the federal statutes and affirmed a judgment against Southeast Airlines.

The Supreme Court of Tennessee in reaching this result proceeded upon the theory that the transaction involved did not fall within the protection and reach of the Supremacy Clause of the Constitution of the United States because of its conclusion that the Congress, by the enactment of the Federal Aviation Act of 1958, had not occupied the field to the exclusion of state regulation and control of aircraft and the operation thereof within the airspace of the United States. The Tennessee Court thus applied and enforced to plaintiff's disadvantage, state law, in accordance with Sections 42-106 and 42-107 of Tennessee Code Annotated, which law the defendant insisted as applied and enforced was repugnant to the Constitution of the United States and void.

We respectfully insist that under these circumstances, this case falls within the rule announced by this Court in the case of **Dahne-Walker v. Bondurant**, 257 U. S. 282, wherein the Court said:

> "... as the state court applied and enforced to the plaintiff's disadvantage state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

Appellee insists that inasmuch as he did not rely upon the violation of a specific statute of Tennessee relating to the equipping or operation of airplanes, and the law applied and enforced by the courts of Tennessee was the common law of the State, no **statute** of the State was upheld by the judgment of the Supreme Court of the State, despite the provisions of Sections 42-106 and 42-107 of Tennessee Code Annotated.

Neither a litigant nor the Courts of any sovereign state can by silence render nugatory the solemn acts of the legislative body of that state. In applying and enforcing the common law of Tennessee, over the objection of the Appellant that such law was void and unconstitutional as to the transaction out of which the litigation arose, the Supreme Court of Tennessee necessarily upheld the validity of Sections 42-106 and 42-107 of Tennessee Code Annotated authorizing the application of such law and upheld a statute of the state over the insistence of the defendant that as applied such statute was invalid because in conflict with the federal constitution.

The cases of **Anonymous v. Baker**, 360 U. S. 287, and **Rohr Aircraft Corporation v. County of San Diego**, 362 U. S. 628, cited by Appellee (Brief, p. 5) are not applicable here.

In the case of **Anonymous v. Baker**, 360 U. S. 287, the Federal Constitutionality of the state law was never presented to the state courts of New York. It was raised for the first time on the appeal to the Supreme Court of the United States. This is an entirely different situation from that presented in the case at bar, where the record shows that in the trial court, in the intermediate appellate court, and in the Supreme Court of the State, the Appellant insisted that the state law was unconstitutional because it was in contravention of the Federal Constitution.

In the case of **Rohr Aircraft Corporation v. County of San Diego**, 362 U. S. 628, it appears that the Appellant did not question the constitutionality of the California statute imposing taxes upon property owned by the Reconstruction Finance Corporation, but attacked the tax assessment on the ground that such assessment infringed the taxpayer's federal rights, privileges or immunities. Such an attack does not, as we understand the law, sup-

port an appeal to this Court but only a review upon Petition for Certiorari.

In the case at bar, the Appellant insisted at every opportunity in the state courts that the state law as applied was repugnant to the Constitution of the United States. Appellant also insisted in the state courts that the application of the law of Tennessee infringed its federal rights, privileges and immunities. Inasmuch as the Appellant herein couched its objections in the state court on both theories, we submit that it properly comes into this Court on an appeal under Section 28 U. S. C. 1257 (2). In the alternative it can have a review of the judgment of the Tennessee Supreme Court on Petition for Certiorari under 28 U. S. C. 1257 (3).

Therefore, if this case is not properly here by appeal, we respectfully ask that the Court consider the appeal as a petition for writ of certiorari and grant the writ.

SUBSTANTIAL FEDERAL QUESTION PRESENTED.

Appellee asserts that no substantial federal question is presented by this Appeal because it is settled law that the doctrine of federal pre-emption does not preclude state courts from awarding damages according to its traditional law of torts in cases where the federal statute provides no civil remedy for tortious conduct.

We most respectfully insist that such is not the law. Although in some instances where the field has been otherwise pre-empted by federal legislation this Court has permitted the states to grant compensation for the consequences of tortious conduct as determined by their traditional law of torts, this Court has never hesitated to abrogate state law where satisfied that Congress has completely occupied the field, or where the enforcement of state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Time after time since Chief Justice Marshall made the pronouncement in **M'Culloch v. Maryland** (U. S., 4 Wheat. 316, 427), this Court has reiterated and applied the following Rule:

> "It is of the very essence of supremacy to remove all obstacles to its own action within its own sphere, and to so modify every power vested in subordinate governments, as to exempt its own operations from all other influence."

Moreover, a state cannot circumvent or abrogate the federal statute by applying its own laws of private right. In the recent case of **Free v. Bland** (May 21, 1962), ... U. S. ..., 8 L. ed. (2d) 180, this Court held that the right of survivorship in United States government bonds is to be determined by federal law, which prevails over conflicting Texas community property law. In that case the Supreme Court of Texas, in holding that the right of survivorship was to be determined by the law of Texas, said:

> "'It is clear that the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved. Bank of America Trust & Savings Ass'n v. Parnell, 352 U. S. 29.'"

This Court, speaking through Chief Justice Warren, reversed, saying:

> "The Supreme Court of Texas's interpretation of the Supremacy Clause is not in accord with the controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article 6, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court

that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield."

In the case of **Garner v. Teamsters C & H Union**, 346 U. S. 485, this Court said:

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

In the case of **Farmers' Educational and Cooperative Union of America v. WDAY, Inc.**, 360 U. S. 525, this Court affirmed the decision of the Supreme Court of North Dakota in dismissing a complaint for libel on the ground that Section 315 of the Federal Communications Act of 1934 pre-empted the field and rendered the defendant radio station immune from liability despite the North Dakota libel laws. In that case this Court, speaking through Mr. Justice Black, said:

"We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

In the case of **San Diego Building Trades Council v. Garmon**, 359 U. S. 236, this Court found that by the National Labor Relations Act the Congress of the United

States had so pre-empted the field that state power and state jurisdiction to award damages for tortious conduct must yield to the federal law. In that case the Court said:

> "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

Thus, it is clear that the regulation of any field within the federal sphere cannot be curtailed or circumvented by the application of state law in tort actions between private citizens. In all cases where state law is attacked as invalid because supplanted by federal law, the question is: Has the Congress supplanted state law? Such is the question here.

We respectfully insist that by the Federal Aviation Act of 1958, the Congress did pre-empt the field and supplant all state law relative to the control of aircraft and the operation thereof in the navigable air space of the United States.

It is clear that the control of aircraft and the operation of aircraft within the navigable air space of the United States are in the federal domain and that Congress may take unto itself all regulatory authority over them.

We respectfully insist that in enacting the Federal Aviation Act of 1958, it was the clear and manifest purpose of the Congress to supersede the powers of the states with reference to the regulations of aircraft and the operation thereof in the navigable air space of the United States.

As this Court pointed out in the cases of **Rice v. Santa Fe Elevator Corp.**, 331 U. S. 218, and **Pennsylvania v. Nelson**, 350 U. S. 497, there are a number of ways in which the Congress may manifest its intent to pre-empt the field.

Applying these tests to the Federal Aviation Act of 1958, we find:

(1) The scheme of federal regulation provided by the Act is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.

(2) Centralized control of aircraft and their operation is a field which transcends the purely local interest of the states and is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

(3) The uniformity of regulations relating to all aircraft and the operation of all aircraft in the navigable air space of the United States sought to be obtained by the Federal Aviation Act of 1958 reveals the purpose of the Congress to preclude enforcement of state laws on the same subject.

(4) State policy may produce a result inconsistent with the objectives of the Act.

The case of **Richards v. The United States** (February 26, 1962), ... U. S. ..., 7 L. ed. (2d) 492, cited at page 12 of Appellee's brief has no application to the case at bar. The accident out of which that case arose occurred prior to the enactment of the Federal Aviation Act of 1958, and the negligence complained of was the failure of the United States to enforce the terms of the Civil Aeronautics Act of 1938. The Act of 1958 is much broader in scope and more detailed and comprehensive than was the Civil Aeronautics Act of 1938.

Moreover in the **Richards** case, the question of preemption was not before the Court, and hence was given no consideration.

CONCLUSION

For the reasons heretofore indicated, it is most respectfully insisted that the motion to dismiss filed by the Appellee should be denied and the case ordered to stand for argument.

Respectfully submitted,

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